SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
APR 13 1972
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-107

ATLANTIC COAST LINE RAILROAD COMPANY,

Petitioner,

against

ERIE LACKAWANNA RAILROAD COMPANY and THEODORE BENAZET,

Respondents.

REPLY BRIEF FOR PETITIONER

DEVEREUX MILBURN,
2 Wall Street
New York, New York 10005,
Attorney for Petitioner Atlantic Coast Line Railroad Company.

Of Counsel

LOUIS L. STANTON, JR.
JEROME L. GETZ
CARTER, LEDYARD & MILBURN
FRANK G. KURKA

April 12, 1972

INDEX

PAGE

1. This Court should establish a right of contribution in maritime non-collision cases without regard to Congressional failure to enact such a statutory right 1

2. Contribution would harmonize rather than confuse existing maritime law 4

3. The Harbor Workers' Act does not preclude contribution 6

4. Erie has no potential right of indemnity from Atlantic 7

TABLE OF AUTHORITIES

Cases:

Dole v. *Dow Chemical Co.*, N.Y.L.J. April 4, 1972 (N.Y. Ct. App., March 22, 1972) 6

Halcyon Lines v. *Haenn Ship Ceiling and Refitting Corp.*, 342 U.S. 282 (1952) 2, 3, 4, 5

Moragne v. *States Marine Lines*, 398 U.S. 375 (1970) 1, 2

Ryan Stevedoring Co. v. *Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1956) 4, 5, 6

Seas Shipping Co. v. *Sieracki*, 328 U.S. 85 (1946) 4, 6

Union Oil Company of California v. *The Tugboat San Jacinto*, No. 71-900 2

PAGE

Statutes:

Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, 33 U.S.C. §901 *et seq.* 3, 4, 5, 6

Act of August 18, 1959, Pub. L. No. 86-171, 73 Stat. 391, *amending* 33 U.S.C. §933 5

Miscellaneous

S. 555, 88th Cong., 1st Sess. (1963) 2

S. 2485, 90th Cong., 1st Sess. (1967) 3

H.R. 207, 87th Cong., 1st Sess. (1961) 3

H.R. 11267, 86th Cong., 2d Sess. (1960) 3

H.R. 14243, 90th Cong., 1st Sess. (1967) 3

Hearings on S. 2485 before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 90th Cong., 1st & 2d Sessions (1968) 4

Hearings on H.R. 207 before the Subcomm. on Merchant Marine of the House Comm. on Merchant Marine and Fisheries, 87th Cong., 1st Sess. (1961) .. 3

H. Rep. No. 1515, 87th Cong., 2d Sess. (1962) 3

In the

Supreme Court of the United States

October Term, 1971

No. 71-107

Atlantic Coast Line Railroad Company,

Petitioner,

against

Erie Lackawanna Railroad Company and Theodore Benazet,

Respondents.

REPLY BRIEF FOR PETITIONER

1. This Court should establish a right of contribution in maritime non-collision cases without regard to Congressional failure to enact such a statutory right.

It is conceded that this Court has the *power* to establish a right of contribution in this case. In *Moragne* v. *States Marine Lines*, 398 U.S. 375 (1970) this Court emphasized the *wisdom* of establishing a maritime right in the absence of Congressional action and even in the face of current Congressional activity:

> "Respondents point out that a bill has been introduced in the United States Senate, by request, which would, among other things, extend the Death on the High Seas Act to include deaths in state territorial waters. S. 3143, 91st Cong., 1st Sess. To date no hearings have been scheduled or other action taken on the

bill. The mere possibility of future legislation in this field does not, of course, affect the legal merits of petitioner's claim that the rule of *The Harrisburg* is no longer a valid part of maritime law. See *United States* v. *W.M. Webb, Inc.*, 397 U.S. 179, 194 n. 21 (1970).

"Nor do we think that Congress' failure to take action on the pending bill, or to pass a similar measure over the years as the law of deaths on territorial waters became more incongruous, provides guidance for the course we should take in this case. To conclude that Congress, by not legislating on this subject, has in effect foreclosed, by negative legislation as it were, reconsideration of prior judicial doctrine would be to disregard the fact that 'Congress has largely left to this Court the responsibility for fashioning the controlling rules of admiralty law.' *Fitzgerald* v. *United States Lines Co.*, 374 U.S. 16, 20 (1963)." Id., at 405, n. 17.

No bills introduced in Congress in the twenty years since the *Halcyon*[1] decision would apply to a case such as this. S. 555 (Respondent's brief, Appendix A), although it is directed towards establishing rules for apportionment of damages in an instance of "collision or other maritime casualty", appears to deal with the obligations of two or more vessels among each other and the proportional allocation of liability between them according to fault.[2] (See S. 555, Section 4(a).)

No implication adverse to the wisdom of this Court's establishing a right to contribution in this case should be

---

[1] *Halcyon Lines* v. *Haenn Ship Ceiling and Refitting Corp.*, 342 U.S. 282 (1952).

[2] This is the question which the Court now has before it in *Union Oil Company of California* v. *The Tugboat San Jacinto*, No. 71-900.

drawn from the absence of pressure upon Congress to overrule *Halcyon*.[3] As stated in our main brief, much of

---

[3] Interestingly, the pressure which might have been directed towards overruling *Halcyon* was instead directed against the right of longshoremen and harbor workers to sue shipowners at all. H.R. 11267, which would have amended Section 5 of the Longshoremen's and Harbor Workers' Compensation Act (the "Harbor Workers' Act") "to insure that employers will be immune for injuries for which compensation has been paid", was introduced in the 2nd Session of the 86th Congress on March 18, 1960 and referred to Committee. No further action was taken on the bill because the shipowners convinced the stevedores to abandon the bill and join the shipowners in a common effort to secure legislation eliminating third-party suits by harbor workers. Statement of Abraham E. Freedman, Esq. in Hearings on H.R. 207 before the Subcomm. on Merchant Marine of the House Comm. on Merchant Marine and Fisheries at 156, 87th Cong. 2d Sess. (1961).

H.R. 207, a bill which would have eliminated a shipowner's obligation of seaworthiness, was introduced on January 3, 1961 in the 1st Session of the 87th Cong. and was referred to Committee. Hearings were held on June 26-28, 1961 and February 20-21, 1962. Hearings on H.R. 207 before the Subcomm. on Merchant Marine of the House Comm. on Merchant Marine and Fisheries, 87th Cong., 1st Sess. (1961). Shipowners and stevedores testified in favor of the bill. See, *e.g.*, statement of J. Stewart Harrison, Esq., Hearings on H.R. 207 at 5. H.R. 207 was favorably reported with amendments by the full committee on March 27, 1962, with the title "A bill to restrict the liability of vessel owners and others in suits based upon the warranty of seaworthiness, and for other purposes". H. Rep. No. 1515, 87th Cong., 2d Sess. (1962). No further action was taken.

S. 2485, a bill to amend the Harbor Workers' Act to increase the benefits available thereunder, was introduced by Senators Yarborough and Morse in the 1st Session of the 90th Congress on September 29, 1967 and was referred to the Senate Labor & Public Welfare Committee. Hearings were held before the Subcommittee on Labor on November 16, 17, and 29, 1967, January 29 and 30, 1968 and February 19 and 20, 1968. Hearings on S. 2485 before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 90th Cong., 1st & 2d Sessions (1968). Representatives of the shipowners and stevedores testified in favor of the elimination of shipowners' liability for both unseaworthiness and negligence. See, *e.g.*, statement of Frank A. Scanlan, Esq., in Hearings on S. 2485 at 118. No further action was taken on the bill.

H.R. 14243, a companion bill to S. 2485, was introduced by Rep. Cohelan in the 1st Session of the 90th Congress on December 4, 1967 and was referred to the House Education and Labor Committee. No further action was taken on the bill.

the adverse effect of that decision has been eroded by *Ryan*[4] and the line of cases following it. The policy considerations behind this Court's development of maritime indemnity rights since *Halcyon* also apply to contribution. No reason remains for further deference to Congressional inactivity.

2. Contribution would harmonize rather than confuse existing maritime law.

The establishment of a right of contribution here would not "frustrate" this Court's decisions relating to the rights of longshoremen, shipowners and stevedores in maritime personal injury actions (Respondent's brief, pp. 17-30). Reliance is placed upon *Seas Shipping Co.* v. *Sieracki*, 328 U.S. 85 (1946) for the principle that "a shipowner's obligation of seaworthiness cannot be shared with or delegated to other parties", and the assertion that contribution would be inconsistent with this principle. (Respondent's brief p. 21.)

This Court held in *Sieracki* that the shipowner's obligation is to compensate an injured harbor worker in full for injuries due to any unseaworthy condition. Once the shipowner has discharged this obligation, there is no reason to deny it the right to contribution from another party whose negligence contributed to the injury. Contribution will not dilute the shipowner's duty to maintain a seaworthy ship, any more than does the application of the implied warranty of workmanlike performance doctrine approved in *Ryan*.[4] The full and complete compensation of the harbor worker

---

[4] *Ryan Stevedoring Co.* v. *Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1956).

is not an issue in this case whether *Halcyon* be overruled or not.[5]

Contribution is not "fundamentally incompatible" with the obligation of seaworthiness imposed on, and indemnity rights accorded to, shipowners by the decisions of this Court. (Respondent's brief, p. 26.) In fact, recognition of a right of contribution would not affect these prior decisions in any way although contribution is a method of loss distribution preferable to the traditional indemnity theory developed in *Ryan* and succeeding cases. This Court need not reconsider or overrule these indemnity cases in deciding whether to award a right of contribution here. A worker's right to bring an action for unseaworthiness

---

[5] Mr. Justice Black, the author of *Halcyon*, suggested that *Halcyon* furthered the interest of an injured longshoreman because it encouraged his employer to assist him in asserting his rights against third parties who might be liable to him. *Ryan Stevedoring Co.* v. *Pan-Atlantic S.S. Corp.*, 350 U.S. 124, 144-47 (1955) (dissenting opinion). At that time, the Harbor Workers' Act required the injured worker to choose between two options. He could (1) waive statutory compensation from his employer and sue the third party, or (2) accept statutory compensation, whereby his employer could sue the third party as a statutory assignee but was obliged to turn over to the employee any amount collected in excess of the amount of the statutory compensation. Justice Black reasoned that if a third party had a right to contribution from the employer, the latter would have no incentive to finance the employee's suit against the third party.

To the extent that rationale supported *Halcyon*, it is no longer valid. As Mr. Justice Black pointed out, *Ryan* removed the employer's incentive to assist his employee in cases where it applied. Moreover, Section 33 of the Harbor Workers' Act was amended in 1959 to allow an employee to sue a third party even though he had accepted statutory compensation. Act of August 18, 1959, Pub. L. No. 86-171, 73 Stat. 391, *amending* 33 U.S.C. §933. This amendment made it unnecessary for the employee to choose between statutory compensation and a third-party action. Thereafter, the employee could use the statutory compensation to finance a third-party suit, and did not need to rely on the economic interest of his employer to do so for him.

under *Sieracki* would not be affected. If the worker recovers, the defendant could still assert any indemnity rights available under *Ryan* against the worker's employer or others. The question of contribution might never arise if such indemnity rights were available. Where the defendant is not entitled to indemnity, however, there is no reason to deny him the right of contribution from a third party if the negligence of both contributed to the worker's injury. The fact that the worker chooses to recover from a shipowner on a theory of unseaworthiness rather than negligence should not prevent a right of contribution if the conduct giving rise to unseaworthiness liability also constitutes negligence.

Ironically, here it is Erie who owned the float and owed plaintiff a duty of seaworthiness. Atlantic had no such absolute liability—Erie did. Erie is seeking to emerge scotfree from the litigation (as if that would promote rules of marine safety).

3. The Harbor Workers' Act does not preclude contribution.

The Harbor Workers' Act may exclusively control the relationship between Erie and plaintiff, but it has nothing to do with the relationship between Erie and Atlantic. It neither enlarges Atlantic's rights, nor diminishes them, as against Erie. The cause of action between them is "based on a separable legal entity of rights to be adjudicated."[6] The dollar amount in issue between them is established.

---

[6] In *Dole* v. *Dow Chemical Co.*, the Court of Appeals of New York dealt with this situation (under the Workmen's Compensation Law) and with the division of responsibility according to fault. Its March 22, 1972 opinion (not yet reported) is attached hereto as Exhibit A.

The division of those damages must be decided between them—without reference to or control by the Act.

4. Erie has no potential right of indemnity from Atlantic:

The argument that Erie was passively negligent while Atlantic was actively negligent, with the result that Atlantic must indemnify Erie, is wholly without merit. Whether one party was actively negligent and the other passively negligent was not presented to the jury. The jury did find, however, that Erie was negligent and that its negligence contributed substantially to plaintiff's injury. (A. 62) It also found that Atlantic was negligent, but made no finding as to how "substantial" (if at all) its negligence was. (A. 61) Thus the facts do not support Erie's contention that it was less negligent than Atlantic. The car was in Erie's sole possession for three days before the accident, during which time Erie neglected its duty to inspect it and Atlantic could not possibly inspect it.

Respectfully submitted,

DEVEREUX MILBURN,
2 Wall Street
New York, New York 10005,
Attorney for Petitioner
Atlantic Coast Line Railroad Company.

Of Counsel

LOUIS L. STANTON, JR.
JEROME L. GETZ
CARTER, LEDYARD & MILBURN
FRANK G. KURKA

April 12, 1972

APPENDIX

EXHIBIT A

Opinion of the Court of Appeals,
State of New York

Decided March 22, 1972.

(New York Law Journal, Tuesday, April 4, 1972)

Before:

Fuld, *Chief Judge;*

Burke, Scileppi, Bergan, Breitel, Jasen and Gibson,
Justices.

Bernice E. Dole, individually etc.,
Plaintiff,

—v.—

The Dow Chemical Company,
Defendant.

The Dow Chemical Company,
Third-Party Plaintiff-Appellant,

—v.—

McLeod Industrial Fumigators
& City Exterminators, Inc.,
Third-Party Defendant,

and

George Urban Milling Co.,
Third-Party Defendant-Respondent.

BERGAN, J.—Appellant Dow Chemical Company is defendant in an action for negligently causing the death of plaintiff's husband, and it is third-party plaintiff in a claim over against the husband's employer George Urban Milling Company. Another claim over by appellant against McLeod Industrial Fumigators & City Exterminators, Inc., is not involved in this appeal.

Dow is the manufacturer of chemicals. It produced Methyl Bromide, a penetrating and poisonous fumigant used for control of storage insects and mites. This product is labeled by Dow as poisonous, dangerous and highly volatile. Urban used it to fumigate a grain storage bin and shortly after fumigation it directed plaintiff's husband, its employee, to enter the fumigated bin to clean it. In doing this he was exposed to the poison which resulted in his death.

The negligence charged to Dow by plaintiff is that the poison was not properly labeled to warn users of its dangers; in failing to warn and instruct users that entry without protection into an enclosed area where the poison had been employed would be dangerous; and in failing to warn that use in an enclosed structure should be followed by effective dissipation of vapors or the lapse of time enough to allow dissipation.

Dow's answer to the complaint is both a denial of its own negligence and an allegation of affirmative negligence by decedent. Its third-party complaint against George Urban Milling Company alleges that the Methyl Bromide used by Urban was properly labeled with full warning of its dangerous nature; that it had furnished Urban with printed material relating to its use in fumigation and that Urban had access to and was aware of this material.

From this it is alleged by Dow that if decedent's death was caused by negligence it was the result of the "active and primary negligence" of Urban and the negligence of Dow "if any" was "merely passive and secondary."

The negligence of Urban is alleged by Dow to have been its improper precautions in fumigating with Methyl Bromide; in using for this work untrained personnel; in failing to follow instructions on the label and the literature available to it; in failing to test the premises after fumigation and to properly aerate it afterward. If plaintiff recovers Dow asks judgment over against Urban "for the full amount of such judgment."

Urban moved at Special Term to dismiss the third-party complaint as to it. This motion was denied. On Urban's appeal, the Appellate Division unanimously reversed and dismissed that pleading on the ground liability over would not be allowed if the plaintiff established that Dow's negligence in mislabeling and insufficient warning contributed to the accident.

This would be, the court noted, "active negligence of a character which would bar Dow from recovery against the user of the product" even though the user also was negligent. That view is consistent with decisions of this court (e.g., Jackson v. Associated Dry Goods Corp., 13 N. Y. 2d 112, 116; Colon v. Board of Educ. of City of N. Y., 11 N. Y. 2d 446, 451; Bush Term. Bldgs. v. Luckenbach S.S. Co., 9 N. Y. 2d 426, 430 et seq.; Putvin v. Buffalo Elec. Co., 5 N. Y. 2d 447; McFall v. Compagnie Maritime Belge, 304 N. Y. 314, 329-330).

The "active-passive" test to determine when indemnification will be allowed by one party held liable for negligence against another negligent party has in practice

proven elusive and difficult of fair application. The terms "primary" and "secondary" negligence, also used in the Dow pleading, have been regarded as more accurate and technically appropriate.

But the policy problem involves more than terminology. If indemnification is allowed at all among joint tortfeasors, the important resulting question is how ultimate responsibility should be distributed. There are situations when the facts would in fairness warrant what Dow here seeks—passing on to Urban all responsibility that may be imposed on Dow for negligence. There are circumstances where the facts would not, by the same test of fairness, warrant passing on to a third party any of the liability imposed. There are circumstances which would justify indemnity on the basis of apportionment of responsibility between third-party plaintiff and third-party defendant.

The basic theoretical bar at common law to any apportionment among those who committed torts, either by indemnity or by contribution, was the unwillingness of the law as a matter of policy to make relative value judgments of degrees of culpability among wrongdoers (42 C. J. S., Indemnity, sec. 27[a], p. 606). The rule springs from the celebrated decision in Merryweather v. Nixan (101 Eng. Rep. 1337 [K. B. 1799]; see Reath, Contribution Between Persons Jointly Charged for Negligence—Merryweather v. Nixan, 12 Harv. L. Rev. 176-178; and note as to subsequent British and American treatment of the rule in 65 Col. L. Rev. 123, Toward A Workable Rule of Contribution, n. 2; and Allocation of Loss, 41 So. Cal. Rev. 728, 729, 730; and see general discussion by Prosser, The Law of Torts [4th ed.], addressed to contribution. [*sic*] indemnity and apportionment of damages, secs. 50, 51, 52).

Consistently with this theory at common law, the wrongdoer selected by the injured party for suit must have succeeded in avoiding any part of responsibility; and otherwise he would have to assume all of it without redress. This doctrine no longer is applied rigorously. For one thing the statute has altered the basic policy against contribution by allowing one joint tortfeasor subjected to judgment, to compel equal contribution by another who is subjected to the same judgment (CPLR 1401).

The effective application of this statute, depends, however, on the adjudication of joint tort responsibility which, as a matter of practice, depends in turn largely on the willingness or ability of the injured party to sue more than one of those responsible for his damage (see discussion of this aspect of the problem in Putvin v. Buffalo Elec. Co., 5 N. Y. 2d, p. 453, supra).

The "active-passive" negligence concept as it has developed in New York is itself an abandonment of the rigorous common-law policy; since it allows full indemnity in favor of one found to be passively negligent against another found to be actively negligent who could be brought into the action by the passively negligent party and required to answer the claim over.

This process in practical application became a measure of degree of differential culpability, although the degree was a large one. The "passive" negligent act was treated by the court as less a wrong than the "active" negligent act. The result has been that there has in fact emerged from the statutory change and from the judicial decisions an actual apportionment among those who participate responsibly in actionable torts.

This change in concept and the persistent criticism of the active-passive basis of apportioning liability between de-

fendants found responsible in negligence make it useful for the court to re-examine the basic fairness of the uncertain and largely unpredictable nature of the measure of redress that has been allowed by indemnity in favor of a party found negligent against another who played an effective role in causing the damage.

The conclusion reached is that where a third party is found to have been responsible for a part, but not all, of the negligence for which a defendant is cast in damages, the responsibility for that part is recoverable by the prime defendant against the third party. To reach that end there must necessarily be an apportionment of responsibility in negligence between those parties.

The adjudication is one of fact and may be sought in a separate action (cf. Westchester Lighting Co. v. Westchester County Small Estates Corp., 278 N. Y. 175) or as a separate and distinguishable issue by bringing in the third party in the prime action pursuant to CPLR 1007.

The procedural mechanism allowing a defendant to bring in a third party who may be liable to him "on all or part" of the plaintiff's claim (CPLR 1007, substantially taken from former Civ. Prac. Act, sec. 193[2]) was limited in Fox v. Western N. Y. Motor Lines (257 N. Y. 305) virtually to exclude the right of one charged with negligence to bring in another in a claim over. This was on the basis of the inability of one cast in damages to seek recovery over from another as a matter of law.

But Westchester Lighting Co. v. Westchester County Small Estates Corp. (278 N. Y. 175, supra) overruled the substantive basis of Fox by holding that such a claim for indemnity could be asserted in a separate action after judgment, and in a series of other cases the right to some

form of relief over has been sustained, including the theory of implied obligation to indemnify (McFall v. Compagnie Maritime Belge, 304 N. Y. 314, 328, supra), or breach of duty (p. 329), or the absence of a participes criminis relationship (Tipaldi v. Riverside Mem. Chapel, 273 App. Div. 414, 418, affd. 298 N. Y. 686).

It is fair to say that the rather widespread dissatisfaction with the inequity of result, as well as the looseness of terminology, in the "active-passive" axis foreshadowed for the Bar an attempt at realignment of the rule. This is to be observed both in some of the judicial opinions that have articulated the struggle toward fairness, and in professional commentaries.

In McFall v. Compagnie Maritime Belge (304 N. Y. 314, supra) the court permitted indemnity through recovery over by a charterer of a ship found negligent, among other things, in failing to warn stevedores in loading of its cargo known to be dangerous, of the peril in the loading (p. 327).

What seems decisive in the actual decision is that the "factual disparity between the delinquency" of the ship charterer and other defendants "is so great" that indemnity should follow, although the court employed "active" and "passive" negligence as operative terms (p. 330, opn. by Conway, Ch. J.).

The term "factual disparity" was referred to again in Putvin v. Buffalo Elec. Co. (5 N. Y. 2d 447, supra) by Chief Judge Conway in an analysis of McFall (supra) and the active-passive nexus (pp. 458-459).

This differential in quality of responsibility has been applied in a number of decisions tending to sustain the statement that there could be indemnity where a party "was less culpable than the principal wrongdoer, although both are equally liable to the person injured" (42 C. J. S.,

Indemnity, sec. 27[b], p. 606, and cases assembled under n. 30).

It has been observed that the doctrine of indemnity "evolved in the unnatural surroundings of an inflexible rule against contribution" and that courts have relied on "artificial distinctions" such as "active-passive" and misfeasance-nonfeasance" (65 Col. L. Rev. 123, 126, op. cit.).

In an analysis of the California rules affecting contribution and indemnity it was noted by Robert G. Werner (Contribution and Indemnity, 57 Cal. L. Rev. 490, 516): "As long as our present tort system is retained, an effective contribution and indemnity scheme is necessary to handle the growing problems created by multiple tort liability. . . . The present system runs counter to tort policy goals of deterrence, equitable loss sharing by all the wrongdoers, effective loss distribution over a large segment of society, and rapid compensation of the plaintiff—as well as the judicial economy interest in settling all matters arising out of the same transaction in one proceeding."

There is an analysis of the problem moving toward the use by courts of alternatives which will best implement "relevant tort goals" in 41 Southern California Law Review 728 (op. cit.). See, also, on the problem generally, Radoff, Perry J., Contribution Among Joint Tortfeasors (44 Texas L. Rev. 326); Rozell, William B., Contribution Among Joint Tortfeasors (52 Cornell L. Quarterly 407).

The problem of apportionment of responsibility for tort has engaged the attention of several New York State study authorities. In 1934, for example, the Commission on the Administration of Justice recommended the enactment of a comprehensive statute giving a right of contribution

among joint tortfeasors similar to the rights of co-obligors under contracts (N. Y. Negis. [*sic*] Doc, 1934, No. 50[d]).

One of the first studies made by the New York Law Revision Commission was on this subject (1936 Report, pp. 703-747), followed almost twenty years later by a further study in depth of the problem, and of the direction of decisional law (1952 Report, pp. 21-63).

The earlier study noted the refusal to allow contribution among joint tortfeasors was "of doubtful validity even in the most extreme case" (p. 720). The 1952 study observed what seems manifest in the willingness of the court to ameliorate an injustice by the "passive-active" concept, that essentially what had happened is the recognition by the court of a discernible "difference in the degree of wrong committed" (p. 54).

Fifty years ago Robert A. Leflar, a distinguished student of tort law, addressed himself to the closely related problems of indemnity and contribution as they were then developing (Contribution and Indemnity Between Tortfeasors, 81 U. of Pa. L. Rev. 130).

Although he then accepted the limitations on indemnity observed in contemporary law, Leflar argued for a much broader view of apportionment of responsibility among joint tortfeasors by contribution than the law at that time allowed. The reasons outlined apply fully to the question of apportionment between Dow and Urban now before the court. "This result [contribution] is admittedly inconsistent with the doctrine of contributory negligence and related rules; it causes the law to settle between litigants disputes arising out of their own misconduct. But the reasons given against adjudication of such disputes, at least as between joint tortfeasors, are of doubtful validity,

and are completely offset by the social evils which accrue from refusal to adjudicate the disputes. The deciding factor, then, should be fairness as between the parties" (81 U. of Pa. L. Rev., p. 159, op. cit.; see also Report of New York Law Revision Commission [1952], pp. 21-63, op. cit.).

The problem of apportioning liability between third-party plaintiff and third-party defendant in the present case requires consideration of the fact plaintiff represents the estate of the third-party defendant's employee and so no recovery could be had in an action brought by her against the employer or, indeed, by "anyone otherwise entitled to recover damages . . . on account of such injury or death" (Workmen's Compensation Law, sec. 11).

But she here asserts no such cause of action and the cause pleaded by Dow against Urban for indemnity is a very different kind of action. The relative responsibility of the employer and the chemical company for the wrongful death of the employee would be determined only in the action by the chemical company in which the cause asserted is based on a separable legal entity of rights to be adjudicated from the action by the administratix [*sic*] against it (Schubert v. Schubert Wagon Co., 249 N. Y. 253).

The theoretical difficulties have been resolved for this court by Westchester Lighting Company v. Westchester County Small Estates Corporation (278 N. Y. 175, supra), which sustained the right of plaintiff, a utility which had been found negligent in an action for causing the death of defendant's employee, to sue the employer on indemnity for having directly and negligently caused the death which, in turn, had compelled plaintiff to pay damages in an action by the employee's estate.

The difference between the causes of action and the parties pursuing them was decisive. "Plaintiff does not

sue for damages 'on account of' Haviland's death. Plaintiff asserts its own right of recovery for breach of an alleged independent duty or obligation owed to it by the defendant" (op. by Loughran, J., p. 179).

That is a precise description of Dow's third-party claim here. Chief Judge Crane, dissenting alone, felt that if the case were sustained, the liability of the employer should be limited "in amount" to its exposure under the Workmen's Compensation Law (p. 185), but this was a view not accepted by the court.

The problem would not arise in such cases as Bush Terminal Buildings v. Luckenbach S.S. Co. (9 N. Y. 2d 426, supra), Colon v. Board of Education of City of N. Y. (11 N. Y. 2d 446, supra) or Jackson v. Associated Dry Goods Corp. (13 N. Y. 2d 112, supra), where employees were not involved, but it would be relevant in such cases as Putvin v. Buffalo Elec. Co. (5 N. Y. 2d 447, supra) and McFall v. Compagnie Maritime Belge (304 N. Y. 314, supra), where indemnity against employers for injury or death for employees was considered. But in either type of case the issues require separate determinations.

Although, as in Westchester Lighting Company (278 N. Y. 175, supra), the indemnity based on an apportionment of responsibility could be pursued in a separate action by the party cast in damages, there should be no major difficulty in keeping apart the separable issues of liability of the defendant to the plaintiff and of the third-party defendant to defendant-third-party plaintiff in the same trial.

Whether the causes are tried together or separately would rest in the court's discretion, according to the requirements of fairness in the judicial management of the

case. One or both actions could, on stipulation of the parties, be tried by the court.

If tried together before a jury, the instruction would be to consider the third-party plaintiff's cause over only if that party were found negligent; and if that were found, indemnity would depend on the proportion of the blame found against third-party defendant. There might, of course, be a finding leading to no indemnity or to full indemnity.

Where, however, there has been an apportionment of liability based on indemnity between a third-party plaintiff and third-party defendant and the apportionment is not equal, there should not thereafter be a further contribution between them pursuant to CPLR 1401. In authorizing equally shared contribution among tortfeasors jointly found liable, this statute did not contemplate an apportionment already made in the judgment, and the "joint" responsibility described was not one of indemnity.

Right to indemnity, then, as among parties involved together in causing damage by negligence, should rest on relative responsibility and may be apportioned on the facts.

The order of the Appellate Division should be reversed, with costs to abide the event, and the order at Special Term reinstated.

Order reversed, with costs to abide the event, and the order of Special Term reinstated. Opinion by *Bergan, J.* All concur except *Burke* and *Scileppi, JJ.*, who dissent and vote to affirm.